No. 82-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.*,
Respondents

KENAI LUMBER CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Six years after losing in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the State of Alaska is now defending another exercise in "economic Balkanization" on essentially the same underlying grounds—that its ownership of natural resources gives it the right to create discriminatory economic opportunities for Alaskans. The fact that Alaska is one of the wealthiest natural resource states makes its efforts of great practical importance to the nation as a whole. Oklahoma's minnows, New Hampshire's hydropower, Arizona's melons, and Nebraska's border ground water,[1] all pale in comparison in economic terms to Alaska's timber, gas, and oil resources.

[1] *See Sporhase v. Nebraska*, 458 U.S. 941 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Alaska makes sweeping and novel Commerce Clause arguments in order to defend its in-state processing requirement for state-owned timber. On the key question of whether Congress has expressly consented to the State's action, Alaska consigns to a single footnote (*see* Br. 22 n.18) this Court's recent decisions in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), and *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)—both of which involved alleged Congressional consent to the hoarding of natural resources by states. Instead, Alaska concedes that "Congress has not taken the opportunity to enact legislation that literally and explicitly declares its consent" (Br. 21), but contends that it is "a special case" that "the federal government's finely tuned Alaska policy" has singled out for special treatment under the Commerce Clause. (Br. 2, 14.) Moreover, says Alaska, in any event, this Court's long-established rule requiring express Congressional consent is itself "unwarranted." (Br. 20.)

Alaska's argument in support of its restraint under the market participant doctrine is equally sweeping—and very similar to what it argued in *Hicklin v. Orbeck*.[2] Thus, it says that "as a seller of its own timber Alaska . . . is free to choose the terms on which it deals with its prospective purchasers." (Br. 10.) It thereby dismisses all the "limiting principles" which have been suggested in this Court's prior market participant decisions on a variety of grounds, such as that they are "neither workable nor constitutionally based." (Br. 10.) In short, Alaska argues here, as in *Hicklin*, that what it cannot do by statute—to regulate the market in such a way as to burden commerce—it is totally free to do by contract.

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[2] *See* Appellees Br. 49, *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (hereinafter *Hicklin* Br.). ("We suggest that the standard for measuring the validity of the State's exercise of its power as proprietor of certain resources is the same as that applicable to private persons making the same contracts.").

Finally, urges Alaska, even if this Court does not find that it is exempt from the Commerce Clause by reason of Congressional consent or the market participant doctrine, this Court should nevertheless conclude that its primary manufacture requirement imposes no undue burden on foreign commerce.[3] In so doing, Alaska simply ignores this Court's repeatedly restated rule that in-state processing requirements are "virtually *per se* illegal"[4] and its even more stringent standards where foreign commerce is at issue.[5]

Acceptance of Alaska's position by this Court would result in an unprecedented abandonment of the free trade policy embodied in the Commerce Clause. The doctrine of express Congressional consent would be jettisoned in favor of an indeterminate "implicit approval" test; the market participant doctrine would be expanded to allow resource-owning states to erect downstream barriers by contract; and/or the "virtually *per se*" standard of illegality applied by this Court to protectionist in-state processing schemes and state-imposed burdens on foreign commerce would be replaced with a new balancing test turning on the extent of "implicit congressional sanction." (Br. 39.) In other words, Alaska is inviting this Court to revamp totally its Commerce Clause jurisprudence. This it should not do.

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[3] *See, e.g.*, Br. 38 ("Whatever effect it might conceivably have —the sale by one small participant in a large international market— is of insufficient magnitude to constitute a burden for purposes of the foreign Commerce Clause.").

[4] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970), *citing Toomer v. Witsell*, 334 U.S. 385 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928).

[5] *See, e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979); *Board of Trustees v. United States*, 289 U.S. 48, 56 (1933).

I. Alaska's Contention That "Congress Has Expressed Approval Of Alaska's In-State Primary Manufacturing Requirement With Sufficient Explicitness To Remove It From The Negative Implications Of The Commerce Clause" Is Unwarranted.

A. This Court Should Adhere to its Long-Standing Rule That Congress' Consent to State Restraints on Interstate Commerce Must Be "Expressly Stated."

Alaska's defense of the Ninth Circuit's unprecedented holding that "express authorization is not always necessary" (693 F.2d at 893; J.A. 142a), ignores this Court's recent statement that it has only

> found such consent [when] Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause was 'expressly stated.'

Sporhase v. Nebraska, 458 U.S. 941, 951 (1982) (citations and footnote omitted).

Unable to meet this Court's standard, Alaska attacks the standard itself. Thus, this Court's "express consent" rule becomes "an inflexible rule of literal consent" (Br. 20), "the unbending rule of literal consent" (*id.*), and "a wooden rule of literal consent." (Br. 21-22.) This barrage of labels is supported by assertions such as, "It is not within the province of judicial power to dictate to Congress the precise manner in which congressional will must be expressed." (Br. 20.) Such an argument, for which no authority is cited, simply ignores the fact that it is the province of this Court "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and that

> where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

This Court's rule requiring express Congressional consent places the important political questions where they

belong—in Congress. As the Solicitor General has explained,

> [t]he requirement of explicit congressional approval for discriminatory state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from parochial discrimination. It assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views.

(U.S. Br. 10-11; citations omitted.) This Court has made the same essential point.

> It is . . . a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a *locality* is held free to impose them because it, *judging its own cause*, finds them in the interests of local prosperity.

H.P. Hood & Sons v. DuMond, 336 U.S. 525, 543 (1949) (citation omitted, emphasis added). By the same token, the explicit consent rule removes from the courts political questions which Alaska would thrust upon the judiciary under the "implicit approval" rubric.

Yet Alaska here would have this Court "rewrite . . . legislation based on mere speculation as to what Congress probably had in mind," *New England Power Co. v. New Hampshire*, 455 U.S. at 343, on the ground that Congress' "enormous legislative agenda" prevents it from getting around to the matter. (Br. 21.) This argument reflects Alaska's basic error. Imposition of a discriminatory burden on constitutionally protected trade is a serious political question—and is doubly so where either natural resources or foreign commerce is involved. Alaska's in-state preference scheme involves both. Surely it is not unreasonable for this Court to insist that Congress, as the political body representing all the states, *expressly* state its "intent and policy" to sustain a state scheme so facially at odds with the Commerce Clause.

B. Congress Has Not Expressly Consented to Alaska's Primary Manufacture Requirement, Nor Otherwise Approved, Sanctioned, or Authorized That Requirement.

Recognizing that Congress has not in fact expressly consented to its primary manufacture requirement, Alaska asserts that "the federal government" has nevertheless singled Alaska out for special treatment under the Commerce Clause, and that "Congressional policy . . . has affirmatively endorsed an in-state primary manufacturing requirement for timber cut from publicly owned lands in Alaska." (Br. 9.)[6] This is not so.

As has been emphasized in the Solicitor General's brief, Alaska's Commerce Clause justification for its policy rests, not on any *Congressional* authorization,[7] but rather on a *Forest Service* Regulation (originally adopted in 1928) which requires primary manufacturing for timber from *national* forests in Alaska. *See* 36 C.F.R. § 223.10(c). It is from this Regulation that this Court is asked to infer *Congressional* authorization for Alaska's policy with regard to its own timber reserves. (*See* Br. 22.)

Such a conclusion is especially unwarranted here where Congress' timber policy is ambiguous at best. Indeed,

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[6] Indeed, Alaska's brief has numerous references to Congress having "put its imprimatur upon state action" (Br. 9); of "Congressional policy" having "affirmatively endorsed" Alaska's primary manufacture requirement (Br. 9); of the primary manufacture requirement having been "repeatedly reaffirmed by Congress and its responsible agencies" (Br. 10); of "Congressional policy" having "sanctioned Alaska's primary manufacturing requirement" (Br. 19); of "its own in-state manufacturing requirement [having] been affirmed by Congress" (Br. 13); and of a "clear expression of congressional policy sanctioning Alaska's in-state manufacturing requirement." (Br. 14.) Yet, in a prior brief, Alaska flatly admitted that, in fact, Congress has been *silent* with regard to primary manufacturing requirements at both the federal and state levels. (Supp. Resp. Br. 5 n.2; emphasis added.)

[7] U.S. Br. 11 ("It is undisputed that Congress has passed no law expressly authorizing Alaska's restrictions on the sale of timber from state-owned land.").

Congress has spoken only with regard to unprocessed logs from *national forests* in Alaska as elsewhere;[8] except for one isolated instance,[9] it has never approved export restrictions involving logs from *state*-owned lands (including those in Alaska), and, indeed, has repeatedly declined to enact legislation that would have extended export restrictions on logs from other than federally-owned lands. (*See* Pet. Br. 19, 30.) Furthermore, if Congress had wanted to extend the same type of primary manufacture restriction contained in the Forest Service Regulation to the lands given to the State of Alaska, it certainly knew how to do so, for it did exactly that on a limited basis with regard to some of the timber land it turned over to the Alaska natives. 43 U.S.C. § 1621(k)(1) (1976). It pointedly did not do so, however, with regard to the timberland it gave to the State of Alaska.

Alaska also relies heavily on the legislative history of the Alaska Statehood Act to support its position that it is "a special case." (Br. 2, 5, 14.) But that history, if anything, indicates that what Congress sought to do in the Statehood Act was merely to enable Alaska to re-

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[8] *See* Pet. Br. 28-31. Alaska points to the fact that the entire 350 million board foot quota of national forest timber allowed to be exported under the Morse Amendment, Pub. L. No. 90-554, § 401, 82 Stat. 966 (1968), was allocated to the lower 48 states, and says that that allocation is evidence of a "federal policy barring export of unprocessed logs from Alaska." (Br. 13.) Aside from the fact that *Congress* had included Alaska within the purview of the Morse Amendment quota and it was the Forest Service acting on its own that decided to give the entire allocation to the lower 48 states, the quota itself applied only to *national forest* lands. No intent whatever with respect to non-federal lands (whether state or private) can be gleaned from this allocation, despite Alaska's contentions to the contrary.

[9] In 1979 Congress enacted legislation which imposed a ban on the export of unprocessed western red cedar from state-owned as well as federal lands, but Alaska is exempt from even that limited export restriction. *See* Export Administration Act of 1979, § 7(i), 50 U.S.C. app. § 2406(i) (Supp. V 1981); 15 C.F.R. § 377.7 (1983).

ceive full equality with the other states.[10] It also indicates that Alaska's resources were to be developed "in the interests of the United States as a whole",[11] and that Congress was especially concerned about Alaska's history of discrimination against non-residents.[12] In sum, one searches in vain for *any* evidence that *Congress* has "singled out Alaska for unique treatment under federal timber laws" (Br. 13), let alone "the abundant evidence of Congressional support for Alaska's instate processing requirement" (Br. 19), that Alaska claims exists.[13]

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[10] *See* H.R. Rep. No. 624, 85th Cong. 1st Sess. 8 (1958); *see also* S. Rep. No. 1163, 85th Cong. 1st Sess. 9 (1957) ("bill does not grant any advantages over existing States"). Moreover, it is well-established that new states enter the Union on an "equal footing" with the other states, *see, e.g., United States v. Texas*, 143 U.S. 621, 634 (1892); *Escanaba v. Chicago*, 107 U.S. 678, 689 (1883), and there is nothing in the Statehood Act or its legislative history, or any other statute, that indicates that Congress intended Alaska to receive favored treatment under the Commerce Clause, and be exempt from the same Constitutional requirements that apply to the other states.

[11] *See* H.R. Rep. No. 624, 85th Cong., 1st Sess. 4 (1958); *see also id.* at 10 (bill was intended to "open up many of the resources of Alaska for the use of mankind"). Furthermore, while Alaska misleadingly cites the legislative history of the Statehood Act for the proposition that "Congress expressly intended to give the new state sufficient latitude to make use of its newly acquired timber resources to *complement* federal policy and generate Alaska timber processing industries" (Br. 14, emphasis in original), the material cited does not even refer to timber at all, let alone indicate Congress' "express intent" to "generate Alaska timber processing industries." It merely emphasizes that Congress intended Alaska to enter the Union as "a full and equal State, and not as a puppet of the Federal Government," and that "the extreme degree of Federal domination of Alaska's affairs" that had heretofore characterized Alaska's history was intended to be redressed under the Statehood bill provisions. H. Rep. No. 624, 85th Cong., 1st Sess. 7 (1958).

[12] *See* S. Rep. No. 1197, 85th Cong., 1st Sess. 16 (1957). *See also Zobel v. Williams*, 457 U.S. 55 (1982); *Mullaney v. Anderson*, 342 U.S. 415 (1952).

[13] For example, Alaska misleadingly asserts that "Congress has consistently recognized and approved the continuing policy of re-

Nor has any federal *executive agency* "affirmatively endorsed" Alaska's primary manufacture requirement. (*See* Br. 12.) First and foremost, the Forest Service regulation on which Alaska relies for implicit approval of its policy applies only to the "*National* Forest System Lands in Alaska." 36 C.F.R. § 223.10(c) (emphasis added). Whatever policy the Forest Service has developed for administering the *national* forests it has been charged by Congress to manage (*see* 16 U.S.C. § 472a (1976); 36 C.F.R. § 200.3(b)(2) (1983)), certainly does not constitute approval for Alaska's policy with regard to its own timber resources.[14]

Furthermore, the Alaska primary manufacture regulation is *not* "virtually identical" to the federal regulation for National Forests. (Supp. Resp. Cert. Br. 3; *see* Br. 12-14.) Indeed, the very definition of "primary manufacture" used by Alaska and the Forest Service differs, as do the exemptions allowed. *See* Lindell, *Log Export Restrictions of the Western States and British Columbia* (U.S. Department of Agriculture 1978) (J.A. 117a.) Moreover, the factors considered in determining whether a given sale will be subject to a primary manufacturing requirement are significantly different. Alaska's standards underscore the economic protectionist purposes of the Alaska scheme,[15] while those of the For-

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quiring in-state manufacturing for Alaska timber for the express purpose of supporting the state's wood processing industry." (Br. 15.) The authority offered in support of this proposition, however, consists primarily of statements made by *individual* Congressmen acknowledging *Forest Service* policy with regard to timber harvested from *national* forests in Alaska.

[14] Moreover, the stated purpose of the federal regulation is not broadly to "foster the development of the Alaska economy" in general (Br. 1), but rather only "to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the *National Forests* . . . which are geographically isolated from other processing facilities. . . ." 36 C.F.R. § 223.10(c) (emphasis added).

[15] *See, e.g.*, Memorandum to E. Wunnicke from J. Sturgeon, State Forester, Oct. 11, 1983 (Br. A-5); *see also* State of Alaska House

est Service underscore, among other things, "whether such export will . . . provide materials required to meet urgent and unusual needs of the Nation." 36 C.F.R. § 223.10(c). In short, Alaska's contention that the "Alaska primary manufacture requirement . . . allows for the same exceptions as do the federal regulations for federal land," is "directed at the same federal objective, reinforces the identical federal policy, and tracks federal implementing rules" (Br. 14), is just not so.

The situation here is also plainly different from that in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042 (1983) (on which Alaska repeatedly relies). In *White* the relevant federal regulations did more than strike "a harmonious note" (Br. at 10, *quoting* 103 S.Ct. at 1047); the regulations *expressly directed* the local authorities to do exactly what was alleged to be the Commerce Clause violation in that case.[16] Here, in contrast, there is no federal regulation at all to

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of Representatives Resolution No. 3 (1979) (J.A. 53a); State of Alaska Senate Resolution No. 9 (1979) (J.A. 55a); Policy Statement of Governor William Egan (1961) (J.A. 28a.).

Moreover, while the Ninth Circuit found comfort in the fact that the Icy Cape No. 2 sale was offered with the primary manufacture requirement to cushion the impact on the local economy of a temporary suspension of *federal* timber sales from the Tongass and Chugach National Forests (693 F.2d at 893, J.A. 6a), Alaska's imposition of the primary manufacture requirement is clearly not limited to such situations. As Alaska itself concedes, "with limited exceptions Alaska has steadfastly adhered to this [primary manufacture] requirement" (Br. 6), and "remains fully committed to its *general* policy of requiring in-state primary manufacture of its timber." (Br. 9; emphasis added.)

[16] 103 S. Ct. at 1047 n.11. The federal regulations quoted by this Court made clear a basic mandate of "maximum feasible employment of local labor" in projects at least partially financed with federal funds. "Accordingly, every contractor or subcontractor . . . shall be required to employ in carrying out such contract work, qualified *persons who regularly reside in the designated area where such project is to be located. . . .*" *Id.*, *quoting* 13 C.F.R. § 305.54(a) (1982) (emphasis in original).

which Alaska can point that "affirmatively permits" (103 S.Ct. at 1047) Alaska to enact its own primary manufacture requirement.[17]

II. Contrary To Alaska's Contention, Its In-State Processing Requirement Does Not "Fall Squarely Within The Holdings And Reasoning" Of This Court's Market Participant Cases.

Alaska contends that its in-state processing requirement "falls squarely within the Court's holdings and reasoning" in *White*, *Reeves*, and *Alexandria Scrap* (Br. 23.)[18] This argument misreads these decisions and ignores what is actually at issue here: a total ban on the export of a natural resource originally owned by a state but processed by others. Contrary to Alaska's contention, its entry into the market is *not* "precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap*" (Br. 24), for, as this Court specifically noted in that case, "Maryland ha[d] not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur." 426 U.S. at 806.[19] Similarly, in *Reeves* this Court noted that "South Dakota [had not] cut off access to its own cement altogether, for the [state's] policy [did] not bar resale of South Dakota cement to out-of-state purchasers." 447 U.S. at 444 n.17.

In contrast, Alaska here has done exactly what this Court has suggested the states cannot do—prohibit the flow of a state-owned good across state lines with the

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[17] Similarly, in *Parker v. Brown*, 317 U.S. 341 (1943), which Alaska also relies on (Br. 39), the U.S. Secretary of Agriculture had affirmatively cooperated in promoting the state program and had aided it through substantial federal loans. Indeed, this is the ground upon which this Court distinguished *Parker* from *Hood*. *See H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 537.

[18] *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1982); *Reeves v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

[19] This distinction was again emphasized in both the majority and the dissenting opinions in *Reeves*, 447 U.S. at 435; and 447 U.S. at 452 (Powell, J., dissenting).

sole goal of benefiting its own processing industry. Unlike the situation in *Alexandria Scrap*, Alaska's unprocessed logs do not remain in the state "in response to market forces," 426 U.S. at 809-10,[20] but rather in response to state "legislation that overtly blocks the flow of . . . commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[21]

Furthermore, the basic underlying policy reasons for the market participant doctrine are not present here as they were in *Alexandria Scrap*, *Reeves*, and *White*. First, as this Court has recognized, "considerations of state sovereignty," while of substantial importance in cases involving solely interstate commerce, are not equally valid

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[20] Furthermore, here, unlike the situation in *Alexandria Scrap*, the state has not "created a market that did not previously exist"—a market that "owes its [very] existence to a state subsidy program." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 815 (Stevens, J., concurring). While Alaska argues here as it did in *Hicklin* that it has created the market because it could choose not to sell its resources at all (*see Hicklin* Br. 48; Br. 33-34), that completely misses the point. Here there is a preexisting free market (timber processing) upon which Alaska's primary manufacture requirement operates to prevent competition from processors located out-of-state. This case, therefore, involves not "commerce which owes its existence to a state subsidy program," but rather a "state restriction on commerce that flourishes in a free market." 426 U.S. at 815 (Stevens, J., concurring). *See* Memorandum to E. Wunnicke from J. Sturgeon, October 11, 1983 (Br. A-5) ("Primary manufacturing policy limits the options of the logging industry in marketing their products in the world market."). In sum, there is no doubt that Alaska's primary manufacturing requirement is a "state policy designed to protect private economic interests in the State from the forces of the interstate market," not a "[policy] relating to traditional governmental functions, such as education, and subsidy programs like the one at issue in *Hughes v. Alexandria Scrap Corp.* . . ." 447 U.S. at 447 n.1 (Powell, J., dissenting).

[21] *See also White*, 103 S. Ct. at 1049 (Blackmun, J., dissenting) ("*Alexandria Scrap* . . . permits a state to prefer its residents as direct recipients of *certain* subsidies" (emphasis added)); *Hughes v. Oklahoma*, 441 U.S. at 335 ("Overruling *Geer* also eliminates the anomaly that statutes imposing the most extreme burdens on interstate commerce—essentially total embargoes—were the most immune from challenge.").

when it is foreign, rather than interstate, commerce that is involved, as it is here. *See Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. at 449 n.13. *See also Reeves v. Stake*, 447 U.S. at 438 n.9.

Second, despite Alaska's apparent plea for special treatment because of what it characterizes as its "virtually nonexistent economic infrastructure," and its problem of "chronic unemployment" (Br. 27), the truth of the matter is that Alaska "has succeeded in generating a boom economy." M. Barone & G. Ujifusa, *The Almanac of American Politics 1984*, at 24 (1983). Its residents have the highest per capita income in the Union;[22] pay no state income or sales taxes; and are the recipients of yearly money grants from the State made possible by the State's sale of its own natural resources (most importantly oil) which, of course, were originally purchased with federal taxpayer dollars and then given *gratis* to the State.[23] Yet it now seeks even more: the right to prohibit the export of one of its natural resources beyond its state borders for the sole purpose of promoting its own local industrial development. This surely goes far beyond what the states of Maryland and South Dakota sought to do as "guardian[s] and trustees" of their respective residents in *Alexandria Scrap* and *Reeves*.[24]

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[22] *See* U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, at 290 (103d ed. 1982).

[23] Thus, the *Almanac of American Politics* (at 25-26) notes that:

> One problem—if it can be called that—is that Alaska has so much money. Its oil revenues allowed it to repeal its income and sales taxes; they mounted up so much that in June 1982 the state sent every resident of more than six months a check for $1,000. (Alaska wanted to give long-time residents more than others, but the U.S. Supreme Court said no.) That money came from the Alaska Permanent Fund, set up under Governor Jay Hammond, which in early 1983 contained more than $3 billion. . . .

See also Zobel v. Williams, 457 U.S. 55 (1982).

[24] *See also Toomer v. Witsell*, 334 U.S. 385, 409 (Frankfurter, J., concurring). Indeed, Alaska itself conceded as much in *Hicklin* (*Hicklin* Br. 29; emphasis added):

Third, Alaska's action cannot be justified as "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Reeves v. Stake*, 447 U.S. at 438-39. As Alaska itself has explained, it is not acting as would a private actor since a private actor would certainly not forego substantially higher sales prices in favor of promoting a larger social and economic goal, as Alaska contends it is doing. (*See* Br. 24-25.) If anything, Alaska's characterization of its export ban as a "subsidy" underscores Justice Powell's observation in *Reeves* that a state cannot automatically be equated with a private trader "since the state frequently will respond to market conditions on the basis of political rather than economic concerns," and may therefore "attempt to act as a 'market regulator' rather than a 'market participant'." 447 U.S. at 450. In other words, Alaska cannot be equated with a private enterpreneur having absolute discretion to deal with whomever it wants, on whatever terms it chooses, as Alaska claims is its right (Br. 25-26),[25] for the simple reason that it is not acting like any other private trader.

Moreover, Alaska here is not merely "exercising its own independent discretion as to the parties with whom it would deal" as was the case in *Alexandria Scrap* and *Reeves*[26] (and to a somewhat lesser extent, in *White* as

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> We believe that the authority to require such a preference, *without erecting a barrier to any non-resident and without limiting in any way the use or distribution of a product* is a necessary and proper incident of the State's authority and duty to manage its resources for the "maximum enjoyment" of its people.

[25] At heart, Alaska's contentions in this regard are essentially the same as those this Court firmly rejected in *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978). (*See Hicklin* Br. 12-16; 46-49.)

[26] Alaska contends that "the Court's decision in *Reeves* made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the *terms* on which it will sell its timber." (Br. 25;

well).[27] Alaska, quite simply, is acting as a market regulator, not a market participant. As the Solicitor General has explained:

> Alaska . . . by imposing its primary manufacture requirement, is not selecting the parties to whom it wishes to sell its timber, but is instead selecting the timber *processors* with whom its purchasers must deal with respect to the processing of the purchased timber. . . . Although Alaska may be a participant in the timber market, and therefore perhaps entitled to some leeway in the selection of those to whom it

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emphasis added.) This is not so, for *Reeves* did not concern any terms or conditions of sale as does Alaska's action here; it involved only the state's right to choose with *whom* it would deal. As the dissent in *White* recognized, "The simple unilateral refusals to deal the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners." 103 S. Ct. at 1050 (Blackmun, J., dissenting). Moreover, although *United States v. Colgate*, 250 U.S. 300 (1919), affords a private trader the right unilaterally to choose with whom he will deal, it certainly does not go beyond that to allow that trader to impose on buyers any and all contractual terms and conditions he wants, regardless of their anticompetitive effect. *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

[27] Despite Alaska's reliance on *White*, that case cannot be read to sanction any and all downstream regulation by a state. Indeed, this Court recognized in *White* that there were "limits" to the downstream conditions the states could impose (103 S. Ct. at 1046), and, as the dissent suggested, *White* may simply reflect this Court's traditional recognition of the special sovereign interest of the localities in hiring their own employees. *See* 103 S. Ct. at 1049 n.2, 1051-52 (Blackmun, J., dissenting); *see also National League of Cities v. Usery*, 426 U.S. 822 (1976); *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). This is also reflected in the majority opinion, where the Court noted that all those affected by the order were "in a substantial if informal sense working for the city." 103 S. Ct. at 1046 n.7. Here, in contrast, the impact of Alaska's primary manufacture requirement reaches deeply into a market, where, by no stretch of the imagination, can it be said that the timber processors are "working for the [state]" in any sense at all.

> chooses to sell timber . . . the imposition of the primary manufacture requirement transforms the State into a *regulator* in the timber processing market. The instate processing requirement clearly constitutes downstream regulation, *i.e.*, an attempt to impose restrictions beyond the initial disposition of the timber.

(U.S. Br. 20-21; emphasis in original.) Thus, unlike the case in *White*, Alaska's action is not restricted to "a discrete, identifiable class of economic activity in which the city is a major participant," 103 S. Ct. at 1046 n.7, for while Alaska may be a participant in the timber market, the impact of its primary manufacture requirement is felt in another market entirely—that of timber processing. Contrary to Alaska's contention, its primary manufacture requirement reaches "deeply into the private market" (Br. 32), just as surely as did the Alaska hire statute this Court struck down in *Hicklin v. Orbeck*, 437 U.S. 518 (1978). Indeed, Alaska itself in *Hicklin* conceded as much.[28]

Finally, and perhaps most crucially, this case, unlike *Alexandria Scrap*, *Reeves*, and *White*, involves a *natural resource*. Alaska, for obvious reasons, downplays the significance of this Court's distinction in *Reeves* between natural resources and man-made goods (447 U.S. at 444) and, indeed, contends that that distinction has "no basis in sound constitutional analysis." (Br. 29.) That, however, should come as a surprise to this Court, which

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[28] Thus, in *Hicklin*, Alaska distinguished its local hire statute from cited Commerce Clause decisions on the ground that "Local Hire places no restrictions on the exploitation, transportation or distribution of the natural resource." (*Hicklin* Br. 26.) It then concluded that:

> The State could not regulate the employment arising from the development of its resources in a manner which would interfere with interstate commerce in those resources. (Br. 26.)

We agree, yet that is precisely what Alaska has done here with its primary manufacture requirement. *See* Contract (J.A. 88a) ("Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska . . . .").

generally "seems to have treated state actions that concern the disposition of natural resources differently from other actions that are of similar form but that concern different subject matter." Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 576 (1983).[29]

Contrary to Alaska's contention (Br. 29), this distinction does make good constitutional sense. As this Court recognized in *Reeves*, natural resources, unlike manufactured goods, are merely "by happenstance" located within a particular state. 447 U.S. at 444. Although a state may expend some money in maintaining the natural resource or preparing for its sale, the basic, fundamental economic value represented by the resource is generally not due to any particular "risk, foresight or industry" by the fortunate resource-owning state, but rather the "adventitious distribution" of such resource. (*See* Br. 28.) Moreover, unlike the case in *Reeves* where any other state, taking its own "risk" and using its own "foresight and industry," could have established its own cement plant and entered the market to supply its own citizens' needs as did South Dakota, the same cannot be done with respect to natural resources. Either a state has been blessed with

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[29] *See Hughes v. Oklahoma*, 441 U.S. at 335; *see also New England Power Co. v. New Hampshire*, 455 U.S. at 338; *Hicklin v. Orbeck*, 437 U.S. at 532-33; *Pennsylvania v. West Virginia*, 262 U.S. 553, 599 (1923). *But cf. Reeves v. Stake*, 447 U.S. 448-49 n.2 (Powell, J., dissenting) ("Regardless of the nature of the product the State hoards, the consumer has been denied the guarantee of the Commerce Clause that he may look to . . . free competition from every producing area in the Nation to protect him from exploitation by any, *H.P. Hood & Sons v. DuMond*, *supra*, at 539.").

Indeed, even the City of Boston in *White* explicitly recognized the distinction for "market participation" purposes between their local hire restriction, and a case involving natural resources. *White v. Massachusetts Council of Construction Employers*, Pet. Br. 16 n.46 ("The job opportunities created by public funds expended by a city on public works construction plainly cannot be equated with natural resources.").

a particular natural resource or it has not. While some states (most prominently Alaska) are resource rich,[30] others are resource poor, and no amount of risk taking, foresight, or industry will change that basic fact.

If Alaska's position on the market participant doctrine were accepted, it would be able to prevent the vast natural resources it owns from flowing to the other states (and in foreign commerce as well) simply by requiring by contract that all its resources be processed in-state.[31] Thus, unlike its implied consent argument, Alaska's market participant argument is not an "Alaska only" argument. For example, under it, any oil-owning state could ban the export of its oil to other states, requiring that it first be refined in-state. A more serious and fundamental compromise of "the core purpose of the Commerce Clause" (*Reeves*, 437 U.S. at 443) can scarcely be imagined.

In sum, Alaska obviously does not subscribe to the fundamental precept that "the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Instead, it seeks here, as in *Hicklin*,[32] to use the ownership of its natural resources to promote its own prosperity at the expense of

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[30] In addition to timber, Alaska has significant energy resources (oil, coal and geothermal); uranium; hardrock mineral deposits (including antimony, asbestos, barite, chromium, copper, fluorine, gold, iron, lead, mercury, molybenum, nickel, platinum, silver, tin, titanium, tungsten and zinc); fish, and other forms of bird and wild animal life. *See* H. Rep. No. 97 (Pt. II), 96th Cong., 1st Sess. 97-108 (1979).

[31] Indeed, Alaska's statutes already provide that it can impose a similar primary manufacture requirement with respect to its vast oil and gas reserves. Alaska Stat. § 38.06.070(b) (Supp. 1983). *See also* Alaska Admin. Code tit. 5, § 39.198 (1983) (prohibiting foreign vessels and aliens while in Alaska waters from processing fish).

[32] *See Hicklin* Br. 8 ("Despite the fears of appellants that, if Local Hire is upheld, 'Balkanization' of our great Nation is imminent, we must point out that the United States is not one large state.").

others. As this Court suggested in *Reeves* (*see* 447 U.S. at 443), the market participant doctrine was never intended to be used in that way.

III. Alaska's Primary Manufacture Requirement Is *Per Se* Invalid.

As the Solicitor General has explained, "any restriction on log exports is clearly a matter within the exclusive province of the national government." (U.S. Br. 25-26.) In response, Alaska proposes that this Court employ in this case a modified *Pike v. Bruce Church* balancing test, which takes into account what Alaska terms the "implicit congressional sanction for Alaska's primary manufacturing requirement." (Br. 39.) With all due respect, Alaska's proposal completely misses the point.

First, even if only interstate commerce were at issue here, Alaska's primary manufacture requirement is precisely the type of protectionist state legislation to which this Court has consistently applied a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. at 624; *see Pike v. Bruce Church, Inc.*, 397 U.S. at 145.

Second, there can be no doubt that Alaska's primary manufacture requirement does have a direct and substantial impact on foreign commerce,[33] and is therefore subject to the even more stringent standards applied to foreign commerce. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 448-49. In sum, Alaska's protectionist primary manufacture requirement provides the "clearest example" of *per se* invalidity, *Philadelphia v. New Jersey*, 437 U.S. at 624, and no purpose would be served by remanding this case as Alaska has suggested. (Br. 35.)

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[33] In 1981 alone, 53,687,000 board feet of timber were harvested from lands owned by Alaska; from 1971 to 1981, 479,799,000 board feet were so harvested. *See* Division of Budget and Management, Office of the Governor, 1 *Alaska Statistical Review 1982*, at 30 (1983). As Alaska concedes, "Japanese consumers are the principal market target for Alaska timber purchasers." (Br. 34.)

CONCLUSION

The judgment below should be reversed and the case remanded for reinstatement of the district court's judgment.

Respectfully submitted,

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February, 1984